A

SYED OMAR SYED AGIL v. INSTITUT PROFESIONAL BAITULMAL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LOUIS O'HARA J
[ORIGINATING SUMMONS NO: 24 NCVC-1907-12-2015]
B 3 APRIL 2017

LABOUR LAW: *Employment – Misconduct – Allegation of – Employee reported to Malaysian Anti-Corruption Commission ('MACC') and Polis Diraja Malaysia ('PDRM') regarding improper conduct of certain parties in employer's institute –* C *Employer took disciplinary measures detrimental to and against employee – Whether employee qualified as whistleblower and entitled to protection – Whether detrimental actions of employer stemmed from presence of PDRM and MACC at institute – Whether allegations of employee's misconduct an afterthought – Whether employee proved case on balance of probabilities – Whether employee* D *granted relief sought – Whistleblower Protection Act 2010, ss. 2, 10(1), (3) & (7)*

WHISTLEBLOWER: *Disclosure of improper conduct to enforcement agency – Retaliatory action by employer – Whether detrimental action under s. 2 of Whistleblower Protection Act 2010 (WPA) – Whether whistleblower entitled to protection – Whistleblower Protection Act 2010, s. 10(1), (3) & (7)*

E

The plaintiff, in his capacity as Chief Executive Officer of the defendant's Institute Profesional Baitulmal Sdn Bhd ('IPB') had reported to the Malaysian Anti-Corruption Commission ('MACC') and Polis Diraja Malaysia ('PDRM') in regard to certain improper conduct of the employees at IPB. In consequence of the disclosures made by the plaintiff, the IPB took F various disciplinary measures detrimental to and against the plaintiff including but not limited to issuing the 'Notis Siasatan Dalaman Bertarikh 6 Oktober 2015'. The plaintiff was suspended and subjected to disciplinary action, both of which came within the ambit of detrimental action under s. 2 of the Whistleblower Protection Act 2010 ('the Act'), which was G prohibited under s. 10(1), (3) and (7) of the Act. Upon a reading of s. 10(1), (3) and (7) of the said Act, it lay on the defendant to prove that the detrimental action taken against the plaintiff was not in reprisal for the disclosures that the plaintiff made to the MACC and the police. The defendant argued that the charges against the plaintiff were proffered after a H thorough investigation that have long been made and which disclosed misconducts committed by the plaintiff. The plaintiff prayed for the following relief in encl. 59, *inter alia*, a declaration that the defendant terminate the 'notis siasatan dalaman' and suspension of the plaintiff, and to cease all disciplinary proceedings against him.

I **Held (granting relief):**

(1) After considering the surrounding and supporting facts and circumstances, the plaintiff qualified as a whistleblower under the Act. During cross-examination of the defendant's deponents of their

affidavits, it was revealed that there was no investigation or disciplinary action whatsoever even after months of the so called misconduct(s) of the plaintiff which the plaintiff alleged began since January 2015. Even if there was any misconduct, the inactivity on the part of the defendant in regard to the plaintiff's alleged misconduct led to the conclusion that there was not only condonation but bad faith by the IPB to reactivate the disciplinary process after the events of the presence of the PDRM and MACC at the defendant's premises. Thus, it was clear that the detrimental actions of the defendant stemmed from the presence of the PDRM and MACC at the IPB. (paras 16 & 17)

(2) The plaintiff submitted that there was no resolution by the defendant's board to conduct any investigation against the plaintiff or to commence any disciplinary action against the plaintiff. There was no evidence put forward by the defendant to this effect, to rebut the plaintiff's contention. The chairman of the Institute, Dato Wira, had instructed one Zarina to investigate the plaintiff even though there were at that point of time neither specific nor specified complaints against the plaintiff, but which only much later emerged as "salah laku". Neither was the plaintiff informed that he was being investigated nor was he interviewed by Zarina. The allegations of alleged misconduct by the plaintiff was more of an afterthought designed as a desperate defence when none existed to forestall the plaintiff's claim that detrimental action had been taken against him because of his whistleblowing reports to PDRM and MACC. (paras 20-24)

(3) The plaintiff had proved his case on a balance of probabilities and was as such entitled to and accordingly this court granted the relief that he claimed. (para 26)

Legislation referred to:
Whistleblower Protection Act 2010, ss. 2, 7(i), 10(1), (3), (7)

For the plaintiff - Amer Hamzah Arshad & Aston Paiva; M/s AmerBon
For the defendant - Noorun Aini Zakaria; M/s Azaine & Fakhrul

Reported by Suhainah Wahiduddin

JUDGMENT

John Louis O'Hara J:

Introduction

[1] This matter came before this court as the hearing of the plaintiff's amended originating summons, encl. 59.

[2] In regard to encl. 59, prayer 1 had become academic and the plaintiff applied for leave to withdraw prayer 1. In regard to prayer 2, the plaintiff now sought the only relief prayed for as in 2(a) and he withdrew prayer 2(b) and 2(c) as well as prayer 4. The plaintiff maintains prayer 3, 5 and 6.

[3] As such the plaintiff now only prays for the following relief in encl. 59:

> 59. 1 ...
>
> 2. Suatu perintah bahawa Defendan Institut Profesional Baitulmal Sdn Bhd, sama ada melalui pegawai-pegawai, perkhidmatan-perkhidmatan atau ejen-ejennya, dikehendaki mengambil segala langkah-langlah yang perlu dengan serta-merta untuk:
>
> (a) Membatalkan 'Notis Siasatan Dalaman' bertarikh 6.10.2015 dan Penggantungan Kerja tersebut, dan menghentikan tindakan Tatertib tersebut;
>
> 3. Sekiranya yang di atas dibenarkan, bahawa perintah tersebut diendorskan dengan suatu notis dalam Borang 83 Kaedah-Kaedah Mahkamah 2012.
>
> 4. ...
>
> 5. Suatu perintah untuk kos.
>
> 6. Apa-apa relif lain yang difikirkan patut oieh Mahkamah termasuk yang diperuntukkan oteh akta Perlindungan Pemberi maklumat 2010.

[4] This court granted prayer 2(a) as amended, and prayer 3 of encl. 59 with costs under prayer 5. The defendant now appeals against that decision. In handing down its decision, this court stated that proper grounds would follow. These then are the court's proper grounds.

Consideration And Decision

[5] Enclosure 59 is the saman pemula terpinda which amendment was necessitated as a result of the passage of time and intervening events. Originally the court had before it encl. 1 and encl. 3. Enclosure 3 was never heard although the defendant did consent to an *ad interim* injunction pending disposal of encl. 3.

[6] Under s. 2 of the Whistleblower Protection Act 2010 (Act 711) a whistleblower means any person who makes a disclosure of improper conduct to the enforcement agency under s. 6.

[7] Enforcement agency means:

> (a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division, department or agency of such ministry, department, agency or body, conferred with investigation and enforcement functions by any written law or having investigation and enforcement power;
>
> (b) a body established by a Federal law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or

(c) a unit, section, division, department or agency of a body established by a Federal law or State law having investigation and enforcement function.

[8] Part III of Act 711 deals with whistleblower protection under s. 7(1) entitled "Whistleblower Protection", wherein a whistleblower shall be conferred with whistleblower protection as regards, *inter alia*, protection against detrimental action.

[9] Section 10(1) provides that no person shall take detrimental action against a whistleblower in reprisal for a disclosure of improper conduct.

[10] Under s. 2, detrimental action includes the taking or the threat to take disciplinary action, and improper conduct means any conduct which if proved, constitutes a disciplinary offence or a criminal offence.

[11] In summary, the facts are that the plaintiff reported to the MACC and PRDM in regard to certain improper conduct of the employees at the defendant's Institute (IPB). This court is satisfied and finds that MACC and PDRM come within the meaning of enforcement agency under Act 711 and the report contained acts and omissions which came within the meaning of improper conduct.

[12] In particular, the plaintiff in his capacity as chief executive officer of the defendant, made certain disclosures of improper conduct by employees of the IPB to the MACC on 14 August 2015 and to the PDRM on 1 September 2015. It is therefore the decision of this court after considering the surrounding and supporting facts and circumstances that the plaintiff qualifies as a whistleblower under Act 711.

[13] In consequence of the disclosure, the IPB took various disciplinary measures detrimental to and against the plaintiff including but not limited to issuing the 'notis siasatan dalaman bertarikh 6 October 2015'. The plaintiff was suspended as of 7 October 2015 and subjected to disciplinary action as from 19 October 2015, both of which come within the ambit of detrimental action under s. 2, which is prohibited under s. 10(1), (3) and (7) of Act 711.

[14] Upon a reading of s. 10(1), (3) and (7) of Act 711, it lies on the defendant to prove that the detrimental action taken against the plaintiff is not in reprisal for the disclosures that the plaintiff made to the MACC and the police.

[15] The defendant, argues that the detrimental action is not in reprisal for the disclosure. In regard to the disciplinary action, the defendant argues that:

(a) none of the charges ... is in respect of the Disclosure;

(b) the charges were proffered after a "thorough investigation" that have long been made and which disclosed misconducts committed by the Plaintiff.

[16] It is clear to this court and this court therefore finds that the detrimental actions of the defendant stemmed from the presence of the PRDM and MACC at the 1PB on 9 September 2015 and 29 September 2015.

[17] During cross-examination of the defendant's deponents of their affidavits (ie, Dato' Wira Dr Ismail bin Hj Ibrahim (Dato' Wira), Zarina bt Hamzah and Selamah bt Mohd Yusof) it was revealed that there was no investigation or disciplinary action whatsoever even after seven months of the so-called misconduct(s) of the plaintiff, which the defendant alleges began since January 2015. Even if there was any misconduct, the inactivity on the part of the defendant in regard to the plaintiff's alleged misconduct leads to the conclusion that there was not only condonation but bad faith by the IPB to reactivate the disciplinary process after the events of the presence of the PDRM and MACC at the defendant's premises.

[18] The plaintiff submits that there was no resolution by the defendant's board to conduct any investigation against the plaintiff or to commence and disciplinary action against the plaintiff. This court finds that there was no evidence put forward by the defendant to this effect, to rebut the plaintiff's contention.

[19] Then there is also evidence to the effect that the chairman of the Institute Dato' Wira knew of the presence of the MACC at the IPB on 1 September 2015 and 29 September 2015 and also that the IPB was being investigated by both the MACC and the PDRM because of financial irregularities which had been brought to his attention by the plaintiff as far back as in July 2015.

[20] It was the plaintiff who had requested the secondment of Zarina for the purposes of investigating the financial irregularities at the IRB but instead Dato' Wira had instructed Zarina to investigate the plaintiff even through there were at that point of time neither specific nor specified complaints against the plaintiff, but which only much later emerged as "salah laku", giving rise to the contention that these were afterthoughts.

[21] Neither was the plaintiff informed that he was being investigated nor was he interviewed by Zarina. This court has scrutinised Zarina unsigned "Laporan Salah Laku Dr Syed Omar bin Syed Agil, Ketua Eksekutif Profesional Baitulmal". In para. 2 she states as follows:

> 2. Sepanjang tempoh berkhidmat dengan IPB beberapa salahlaku oleh beliau telah dilaporkan kepada MAIWP dan Ahli Lembaga Pengarah (BOD) IPB. Salahlaku yang telah dilaporkan adalah seperti berikut:

and there then follows various allegations against the plaintiff. Zarina in para. 4 of her affidavit encl. 9 states as follows:

> 4. Pada 31.7.2015, saya memulakan perkhidmatan di pejabat Defendan dan melalui surat bertarikh 3.8.3015 saya telah diarahkan untuk membuat satu penyiasatan dan laporan mengenai salahlaku Plaintif. Saya telah

membuat laporan tersebut seperti di ekshibit IBI Affidavit Jawapan Defendan yang diikrarkan oleh Yang Berbahagia Dato' Wira Ismail b. Ibrahim pada 11.1.2016 (See Enclosure 10).

[22] Zarina's laporan does not disclose any findings made by her. As a matter of fact her laporan does not disclose any investigation done by her. Her report in its entirety contains unsubstantiated allegations against the plaintiff.

[23] All Zarina does is to act as a postman *vide* para. 3 of her laporan where she states as follows:

3. Pandangan dan arahan dari mesyuarat BOD adalah dipohon bagi tindakan seterusnya yang wajar dikenakan kepada Dr Syed Omar bin Syed Agil iaitu Ketua Pegawai Eksekutif IPB.

[24] Both Dato' Wira and Zarina were cross-examined on their affidavits and from the cross-examination this court can safely arrive at a finding that not only was there was no thorough investigation but the allegations of alleged misconduct by the plaintiff are more of an afterthought designed as a desperate defence when none exists to forestall the plaintiff's claim that detrimental action had been taken against him because of his whistle blowing reports to the PDRM and MACC disclosing the improper conduct of employees at IPB.

Conclusion

[25] Based upon the above reasons, it is the conclusion of this court that:

(a) the Plaintiff qualifies as a whistleblower under Act 711;

(b) there were detrimental actions in the form of various disciplinary measures detrimental to and against the Plaintiff including but not limited to the issuing of the Notis Siasatan Dalaman bertarikh 6.10.2015;

(c) the detrimental action was in reprisal to the Plaintiff's whistleblowing reports to the PDRM and MACC disclosing improper conduct by the staff of the IPB.

[26] This court therefore further concludes that the plaintiff has proved his case on a balance of probabilities and is as such entitled to and accordingly this court grants the relief that he claims in encl. 59 para 2(a), 3 and costs as in para 5.

Order

[27] So ordered accordingly.